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9
10 BEFORE THE DEPARTMENT OF FINANCIAL PROTECTION AND INNOVATION
11 OF THE STATE OF CALIFORNIA

12 In the Matter of:) CRMLA LICENSE NO.: 41DBO-52629
13 THE COMMISSIONER OF FINANCIAL) CONSENT ORDER
14 PROTECTION AND INNOVATION,)
15 Complainant,)
16 v.)
17 AMCAP MORTGAGE, LTD.,)
18 Respondent.)
19)
20)

21 This Consent Order is entered into between the Commissioner of Financial Protection and
22 Innovation (Commissioner) of the Department of Financial Protection and Innovation (Department)
23 and Respondent AmCap Mortgage, Ltd. (AmCap) and is made with respect to the following facts:

24 **I.**

25 **RECITALS**

26 A. The Commissioner has jurisdiction over the licensing and regulation of entities
27 engaged in the business of a residential mortgage lender and servicer under the California
28 Residential Mortgage Lending Act, commencing at Fin. Code, § 50000 et seq. (CRMLA).

1 B. AmCap is a residential mortgage lender and servicer licensed by the Commissioner
2 pursuant to the CRMLA with license number 41DBO-52629.

3 C. AmCap's principal place of business is located at 9999 Bellaire, Suite 700, Houston,
4 Texas 77036. AmCap employs mortgage loan originators.

5 D. On or around September 13, 2022, the Commissioner commenced a regulatory
6 examination of the books and records of AmCap pursuant to Section 50302 of the CRMLA covering
7 the period from April 1, 2019 through November 30, 2022 (Regulatory Exam).

8 E. The Regulatory Exam disclosed that in 11 out of 24 loan files reviewed (45.8%),
9 AmCap charged borrowers per diem interest in excess of one day prior to the date that the loan
10 proceeds were disbursed from escrow, in violation of Financial Code section 50204, subdivision (o)
11 and Civil Code section 2948.5.

12 F. On or around November 9, 2022, the Department directed AmCap to conduct a self-
13 audit of all loans originated in California since April 1, 2019 to November 30, 2022 to determine the
14 number and amount of per diem interest overcharges, including but not limited to: the borrower loan
15 number, name, loan amount, interest rate, date funds were disbursed by the settlement agent, interest
16 start date, interest end date, amount of interest collected, correct amount of interest, interest
17 overcharged, 10% interest, amount of refund check, date refunded, and first payment due date (self-
18 audit report).

19 G. On or around February 6, 2023, AmCap submitted a self-audit report that disclosed
20 497 out of 1,299 loan files (38.3%) in which AmCap overcharged borrowers per diem interest, in
21 violation of Financial Code section 50204, subdivision (o) and Civil Code section 2948.5. Pursuant
22 to Financial Code section 50504, subdivision (b), between on or around January 23, 2023 and
23 February 1, 2023, AmCap issued refunds to 497 borrowers identified in the self-audit report in the
24 amount of the overcharge plus interest at the rate of 10% per annum from the date of the overcharge.

25 H. A review of 50 loan files from the self-audit disclosed that for three loan files AmCap
26 failed to keep and maintain for 36 months from the date of final entry the business records and other
27 information required by law or rules of the Commissioner, specifically California Code of
28 Regulations, title 10. section 1950.314.4, subdivision (d)(5)(D), which requires AmCap to maintain

1 the closing statement issued by an independent escrow holder on a residential mortgage loan in
2 which the proceeds of that loan were disbursed to that escrow holder, in violation of Financial Code
3 section 50124, subdivision (a)(2). As such, the disbursement date to calculate per diem interest
4 could not be determined for those three loans.

5 I. The review of 50 loan files from the self-audit also disclosed that in four loan files
6 (8%) the refund amount was incorrectly calculated leading to an under-refund in two loan files.

7 J. On or around August 24, 2023, AmCap voluntarily reported to the Commissioner that
8 a review of their self-audit report revealed that in 178 out of the 497 loans that AmCap previously
9 reported were overcharged per diem interest AmCap had inadvertently used an inaccurate
10 disbursement date, resulting in a perceived overcharge. The Department sampled 24 loans out of the
11 178 loans with corrected calculations of per diem interest and determined there were no per diem
12 interest overcharges in the 24 loans. Therefore, this subsequent review of AmCap’s self-audit report
13 determined that in 319 out of 1,299 loan files (24.6%) AmCap overcharged borrowers per diem
14 interest, in violation of Financial Code section 50204, subdivision (o) and Civil Code section 2948.5.

15 K. On or around October 26, 2023 AmCap informed the Commissioner of its intent to
16 surrender its CRMLA license and its intent to cease taking new applications in California before
17 December 15, 2023.

18 L. The Commissioner finds that entering into this Consent Order is in the public interest
19 and consistent with the purposes fairly intended by the policies and provisions of the CRMLA.

20 NOW, THEREFORE, in consideration of the foregoing, and the terms and conditions set
21 forth herein, the parties agree as follows:

22 **II.**

23 **TERMS AND CONDITIONS**

24 1. Purpose. This Consent Order resolves the issues before the Commissioner set forth in
25 Paragraphs A through L above in a manner that avoids the expense of a hearing and other possible
26 court proceedings, protects consumers, is in the public interest, and is consistent with the purposes,
27 policies, and provisions of the CRMLA.

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1 2. Order to Discontinue Violations. AmCap hereby agrees that in accordance with
2 Financial Code sections 50321 and 50323, it will immediately discontinue violating Financial Code
3 sections 50124, subdivision (a)(2) and 50204, subdivision (o); California Code of Regulations, title
4 10, section 1950.314, subdivision (d)(5)(D); and Civil Code section 2948.5.

5 3. Independent Audit.

6 a. AmCap shall engage at its own expense an independent third-party auditor
7 (Auditor) to review AmCap’s California loans regarding per diem interest (Financial Code section
8 50204, subdivision (o) and Civil Code section 2948.5).

9 b. The Auditor shall be an independent certified public accountant, certified
10 public accounting firm, or compliance auditing firm approved by the Department. The Department
11 shall not unreasonably withhold approval of AmCap’s selection of an Auditor.

12 c. AmCap shall contract with the Auditor for the services described herein
13 within 60 days of the Effective Date of this Consent Order as defined in Paragraph 26.

14 d. The Auditor shall submit to the Department an Audit Report based upon its
15 review of AmCap’s California loan originations from December 1, 2022 through December 31, 2023
16 and shall be submitted to the Department by no later than January 31, 2024.

17 4. Payment of Refunds. AmCap affirms that to date it has made refunds for Per Diem
18 Interest Overcharges totaling \$73,074.69.

19 5. Penalty. AmCap shall pay a penalty in the amount of \$161,000.00 for the violations
20 set forth in Paragraph E through J above by no later than 30 days after the Effective Date of this
21 Consent Order as defined in Paragraph 26 below. The penalty shall be made payable in the form of
22 a cashier’s check or Automated Clearing House deposit to the Department of Financial Protection
23 and Innovation and transmitted to the attention of Accounting – Litigation, at the Department of
24 Financial Protection and Innovation, 2101 Arena Boulevard, Sacramento, California 95814-2306.
25 Notice of the payment must be concurrently sent to Sophia C. Kim via e-mail at:
26 Sophia.Kim@dfpi.ca.gov.

27 6. License Surrender. Upon completion of the terms in Paragraphs 3 and 5 above, the
28 Department agrees that it will not unduly delay the processing of AmCap’s license surrender request

1 and will notify AmCap in writing of acceptance of the license surrender. On the date the
2 Department notifies AmCap of the license surrender AmCap shall submit to the Commissioner a
3 declaration under penalty of perjury from an officer with personal knowledge of AmCap's policies
4 and procedures that AmCap has taken no applications and closed no loans from January 3, 2024
5 through the date of surrender.

6 7. Waiver of Hearing Rights. AmCap acknowledges that the Commissioner is ready,
7 willing, and able to proceed with the filing of an administrative enforcement action on the charges
8 contained in this Consent Order. AmCap hereby waives the right to any hearings, and to any
9 reconsiderations, appeal, or other right to review which may be afforded pursuant to the CRMLA,
10 the California Administrative Procedure Act, the California Code of Civil Procedure, or any other
11 provision of law. AmCap further expressly waives any requirement for the filing of an Accusation
12 pursuant to Government Code section 11415.60, subdivision (b). By waiving such rights, AmCap
13 effectively consents to this Consent Order and Order to Discontinue Violations becoming final.

14 8. Failure to Comply with Consent Order. AmCap agrees that if it fails to comply with
15 the terms of this Consent Order, the Commissioner may, in addition to all other available remedies
16 she may invoke under the CRMLA, deny any application and/or summarily suspend or revoke any
17 license granted by the Commissioner to AmCap until AmCap is in compliance. AmCap waives any
18 notice and hearing rights to contest such denial or summary suspension or revocation which may be
19 afforded under the CRMLA, the California Administrative Procedure Act, the California Code of
20 Civil Procedure, or any other provision of law in connection therewith.

21 9. Information Willfully Withheld or Misrepresented. This Consent Order may be
22 revoked and the Commissioner may pursue any and all remedies available under law against AmCap
23 if the Commissioner discovers that AmCap knowingly or willfully withheld or misrepresented
24 information used for and relied upon in this Consent Order.

25 10. Future Actions by Commissioner. If AmCap fails to comply with any terms of the
26 Consent Order, the Commissioner may institute proceedings for any and all violations otherwise
27 resolved under this Consent Order. The Commissioner reserves the right to bring any future actions
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1 against AmCap, or any of their partners, owners, officers, shareholders, directors, employees or
2 successors for any and all unknown violations of the CRMLA and Financial Code.

3 11. Assisting Other Agencies. Nothing in this Consent Order limits the Commissioner’s
4 ability to assist any other government agency (city, county, state, or federal) with any prosecution,
5 administrative, civil or criminal brought by that agency against AmCap or any other person based
6 upon any of the activities alleged in this matter or otherwise.

7 12. Headings. The headings to the paragraphs of this Consent Order are inserted for
8 convenience only and will not be deemed a part hereof or affect the construction or interpretation of
9 the provisions hereof.

10 13. Binding. This Consent Order is binding on all heirs, assigns, and/or successors in
11 interest.

12 14. Reliance. Each of the parties represents, warrants, and agrees that in executing this
13 Consent Order it has relied solely on the statements set forth herein and the advice of its own
14 counsel. Each of the parties further represents, warrants, and agrees that in executing this Consent
15 Order it has placed no reliance on any statement, representation, or promise of any other party, or
16 any other person or entity not expressly set forth herein, or upon the failure of any party or any other
17 person or entity to make any statement, representation or disclosure of anything whatsoever. The
18 parties have included this clause: (1) to preclude any claim that any party was in any way
19 fraudulently induced to execute this Consent Order; and (2) to preclude the introduction of parol
20 evidence to vary, interpret, supplement, or contradict the terms of this Consent Order.

21 15. No Presumption Against Drafting Party. Each party acknowledges that it has had the
22 opportunity to draft, review, and edit the language of this Consent Order. Accordingly, the parties
23 intend that no presumption for or against the drafting party will apply in construing any part of this
24 Consent Order. The parties waive the benefit of Civil Code section 1654 as amended or
25 corresponding provisions of any successor statute, which provide that in cases of uncertainty,
26 language of a contract should be interpreted most strongly against the party that caused the
27 uncertainty to exist.

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1 16. Independent Legal Advice. Each of the parties represents, warrants, and agrees that it
2 has received independent advice from its attorney(s) and/or representatives with respect to the
3 advisability of executing this Consent Order.

4 17. Waiver, Amendments, and Modifications. No waiver, amendment, or modification of
5 this Consent Order will be valid or binding unless it is in writing and signed by each of the parties.
6 The waiver of any provision of this Consent Order will not be deemed a waiver of any other
7 provision. No waiver by either party of any breach of, or of compliance with, any condition or
8 provision of this Consent Order by the other party will be considered a waiver of any other condition
9 or provision or of the same condition or provision at another time.

10 18. Full Integration. This Consent Order is the final written expression and the complete
11 and exclusive statement of all the agreements, conditions, promises, representations, and covenants
12 between the parties with respect to the subject matter hereof, and supersedes all prior or
13 contemporaneous agreements, negotiations, representations, understandings, and discussions
14 between and among the parties, their respective representatives, and any other person or entity, with
15 respect to the subject matter covered hereby.

16 19. Governing Law. This Consent Order shall be construed and enforced in accordance
17 with and governed by California law. Each of the parties hereto consents to the jurisdiction of such
18 court in California, administrative or otherwise, best suited to handle any action or proceeding under
19 this Consent Order, and hereby irrevocably waives, to the fullest extent permitted by law, the
20 defense of an inconvenient forum to the maintenance of such action or proceeding in such court.

21 20. Counterparts. This Consent Order may be executed in one or more separate
22 counterparts, each of which when so executed, shall be deemed an original. Such counterparts shall
23 together constitute a single document.

24 21. Effect Upon Future Proceedings. If AmCap applies for any license, permit or
25 qualification under the Commissioner's current or future jurisdiction, or are the subject of any future
26 action by the Commissioner to enforce this Consent Order, then the subject matter hereof shall be
27 admitted for the purpose of such application(s) or enforcement proceeding(s).

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1 22. Voluntary Agreement. AmCap enters into this Consent Order voluntarily and without
2 coercion and acknowledge that no promises, threats or assurances have been made by the
3 Commissioner or any officer, or agent thereof, about this Consent Order. The parties each represent
4 and acknowledge that he, she or it is executing this Consent Order completely voluntarily and
5 without any duress or undue influence of any kind from any source.

6 23. Notice. Any notice required under this Consent Order shall be provided to each party
7 at the following addresses:

8 To AmCap:
9 Michael Lane Johnson, 9999 Bellaire, Suite 700, Houston, Texas 77036;
10 jared.clayton@myamcap.com.

11 To the Commissioner:
12 Sophia C. Kim, Senior Counsel, Enforcement Division, Department of Financial
13 Protection and Innovation, 320 West 4th Street, Suite 750, Los Angeles, California
14 90013; Sophia.Kim@dfpi.ca.gov.

15 24. Signatures. A fax or electronic mail signature shall be deemed the same as an
16 original signature.

17 25. Public Record. AmCap hereby acknowledges that this Consent Order is and will be a
18 matter of public record.

19 26. Effective Date. This Consent Order shall become final and effective when signed by
20 all parties and delivered by the Commissioner’s counsel via e-mail to AmCap at
21 jared.clayton@myamcap.com.

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27. Authority to Sign. Each signatory hereto covenants that he/she possesses all necessary capacity and authority to sign and enter into this Consent Order and undertake the obligations set forth herein.

Dated: January 8, 2024

CLOTHILDE V. HEWLETT
Commissioner of Financial Protection and Innovation

By _____
MARY ANN SMITH
Deputy Commissioner
Enforcement Division

Dated: January 5, 2024

AMCAP MORTGAGE, LTD.

By _____
MICHAEL LANE JOHNSON
President of AmCap Mortgage, Ltd.